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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-1213

OLIVER R. GRACE, THE GREEN FUND, INC., S. WILLIAM GREEN, EVELYN GREEN and CYNTHIA COLIN, as Executors of the Estate of LOUIS A. GREEN, deceased, EVELYN GREEN and ELBRIDGE SMITH, individually and as stockholders of AMERICAN-HAWAIIAN STEAMSHIP COMPANY in behalf of themselves and of said corporation, and LEVENTRITT LEWITTES & BENDER,

Petitioners,

against

DANIEL K. LUDWIG, BERKSHIRE INDUSTRIES, INC., AMERICAN-HAWAIIAN STEAMSHIP COMPANY, TRUDE WEININGER, PREMIER INVESTING CORPORATION and ROBERT KORSEN,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. Respondents' *ipse dixit* is that the SEC is "perfectly able" (L 6)* to protect minority stockholders without intervention by them. To the contrary, the SEC states that it "welcomes the participation of responsible persons in its administrative proceedings" (20a) and especially in § 17(b)

* Pages of the Brief for Defendants-Respondents Ludwig, Berkshire, and American-Hawaiian are referred to herein with the prefatory initial L; e.g. (L 1). Pages of the Brief for Defendants-Respondents Weininger and Premier are referred to herein with the prefatory initial W; e.g. (W 1). Pages of the Petition for Certiorari and its appendices are referred to without prefatory initials.

proceedings under the Act because:

> "the evidence supporting the application is of necessity one-sided, and the Commission's staff does not and cannot conduct a full-scale investigation of the merits of applications, except in those relatively rare instances where the application appears to require such." (21a-22a)

Thus, the role and needs of the SEC are, by its own statement, far different than supposed by respondents and the Court below (7a).

Moreover, the SEC says it wants that private assistance, otherwise "the Commission, which is the forum established by Congress for the determination of such questions", will be bypassed and "the battle of the fairness of the transaction" will be waged in the district court (23a).

The gist of respondents' argument is that a fee or its reimbursement is earned only where the minority stockholders prove that " 'but for' [their] intervention the SEC would have granted the [unfair] application" (L 5 et seq.; W 13-14). The SEC states, however, that a fee should be granted to "a participant who had taken a substantial role in bringing the fact of unfairness to the Commission's attention" (22a). Unlike the respondents, the SEC does not want to discourage private participation by having the issue of an award for such participation turn on speculation as to what it might have done absent the intervention; it wants the value of the intervention—a fact —to be appraised.

What the SEC might have done without the minority stockholders' help is speculation; that the minority stockholders, with SEC consent and encouragement, gave the SEC vital help is undisputed fact.

The issue is thus clearly drawn: where the SEC says it needs help, and the minority stockholders step in and give

that help, are they not entitled to an attorney's fee, and reimbursement of the fee they paid, for that help? Respondents' whole argument ignores that issue deemed determinative by the SEC. Respondents would rather kill off that assistance to the SEC even if it means frustration of Congressional purpose either by letting unfair mergers be consummated or by shifting the forum for the adjudication of the fairness of mergers from the SEC to the courts.

2. Respondents' position is squarely in opposition to *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375. The only difference between that case and ours is that there the compensable service was rendered in court, here before the Commission. The SEC says it needs help from private attorneys in both court and administrative proceedings. In *Mills*, the Supreme Court, deeming the question of public importance because of the need to encourage maximum enforcement of the securities laws, determined that an attorney's fee should be allowed for court services. Like public importance attaches to private services in SEC proceedings. The SEC indicates that encouragement of private participation in SEC proceedings "is essential for effectuation of the policies of the Act" (22a).*

Since the court below accepted as true for the purposes of defendants' motion to dismiss: that LLB "pulled the 'laboring oar' in the SEC proceedings and that primarily through its efforts Berkshire continuously increased its offer to the public shareholders" (7a), under *Mills*, the complaint should not have been dismissed. Unless reversed, the decision below will be the death knell for private assistance to the SEC in its proceedings.

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* Respondents told the SEC it didn't have jurisdiction to grant the fee, so it ill behooves them to slyly suggest now (L 11-12, W 18) that the SEC is better equipped than the courts to pass on the merits of a fee application. In fact, of course, the courts have far greater experience than the SEC in determining reasonable attorney's fees.

3. Respondents argue (L 12, W 16) that no benefit was conferred; but that conflicts with Mills and the express position of the SEC that a benefit consists in preventing a merger that does not comply with the requirements of the federal securities laws. Here plaintiffs, exposing the SEC applicant's fraud, frustrated its getting the company it controlled at a value of 73 million dollars less than its admitted worth. Moreover, upping the bid price from $275 to $650 per share constitutes a benefit under *Mills* (at 395) to wit, "by estimating the increase in market value of the shares". An added benefit was to give defendants Weininger and Premier and other stockholders who sold their shares to defendant Berkshire at the fraudulent price of $275 per share, an opportunity to rescind their sale without litigation. Some of them did rescind and later sold to Berkshire at $725 per share.

Are not the plaintiff minority stockholders entitled in equity, under principles of unjust enrichment as recognized and applied in *Mills,* to reimbursement of the attorneys' fees they paid for performing that service at the encouragement of the SEC? And are not their attorneys entitled under *Mills* to a reasonable award for rendering that public service, not as "volunteers" (L 6), but as responsible stockholder attorneys, participating in accordance with SEC rules, who took over the laboring oar for the class with the SEC's approval, and achieved an outstanding result?

While defendants Weininger, et al. were separately represented by their own counsel, they omit the salient facts that said counsel never appeared on the merits in the SEC proceeding and that settlement of their litigation resulted from the terms negotiated by the plaintiff attorneys. For doing nothing and taking no risk, defendants Weininger and Korsen, reaped the benefits of $2,327,000. Plaintiff stockholders, who took the risk, have been required to pay a legal fee to LLB for benefiting American-Hawaiian and its stockholders.

4. The defense of respondents Ludwig and Berkshire (L 14-15) to the charge against them of "fraud" and "harassment" is that the fraud was merely an attempt but never consummated because they were caught red-handed by the plaintiff minority stockholder attorneys. Plaintiff stockholders had to protect their property from a fraudulent takeover, their damages are the legal fees paid and reasonably payable to the attorneys who performed the services for them, the other members of the class, and American Hawaiian.

Conclusion

Helping the SEC in a § 17 proceeding, with its encouragement and consent, to frustrate a fraudulant merger application, as the minority stockholders here did, should move a federal court of equity, intent on maximizing enforcement of the federal securities laws, to award a reasonable attorney's fee and reimbursement thereof, to be paid by the investment company, the defrauding SEC applicant, its stockholders, or a combination thereof. That we submit is the teaching of *Mills, supra,* which teaches, also, that what is involved is an important question of law and public policy warranting plenary review by this Court.

Accordingly, the petition for a writ of certiorari should be granted.

Dated: New York, New York, March 14, 1974.

Respectfully submitted,

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Of Counsel:

AARON LEWITTES